

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JAMES DOSS,

Defendant-Appellant.

UNPUBLISHED

April 12, 2007

No. 266375

Wayne Circuit Court

LC No. 05-003139-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMOND EARL GOINS,

Defendant-Appellant.

No. 266830

Wayne Circuit Court

LC No. 05-003139-02

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendants Brian Doss and Demond Goins were each convicted of first-degree felony murder, MCL 750.316(1)(b). Defendant Doss was also convicted of additional counts of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Both defendants were sentenced to life imprisonment without parole for their first-degree murder convictions. Defendant Doss was also sentenced to one to five years' imprisonment for the felon-in-possession conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. The court suspended defendant Doss's sentence for second-degree murder. Defendant Doss now appeals as of right in Docket No. 266375, and defendant Goins appeals as of right in Docket No. 266830. The appeals have been consolidated for this Court's consideration. We affirm.

Defendants' convictions arise from the November 14, 2004, shooting death of Dietrich Davis, who was shot two times in a parking lot outside a liquor store in Detroit. It was

undisputed that defendant Doss was the shooter and that, after Davis was shot, defendant Goins removed Davis's black leather coat with fur trim around the hood.

I. Docket No. 266375

Defendant Doss first argues that the trial court's conduct and comments during trial require reversal. We disagree. Defendant asserts that the trial court belittled defense counsel before the jury and also improperly assumed the prosecutor's role at trial. "Trial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing." *People v Ross*, 181 Mich App 89, 91-92; 449 NW2d 107 (1989). "Although unfair criticism of defense counsel in front of the jury is always improper, reversal is necessary only where the court's conduct denied the defendant a fair and impartial trial by unduly influencing the jury." *Id.* Similarly, a trial court must "avoid any invasion of the prosecutor's role and must exercise caution so that his questions will not be intimidating, argumentative, prejudicial, unfair, or partial." *Id.*

Defendant Doss asserts that the trial court repeatedly improperly chastised defense counsel before the jury, relying on one exchange in particular as an example of the court's conduct. However, the cited instance involved an exchange between the court and defense counsel after defense counsel interrupted the trial court's ruling on another attorney's motion. The record discloses several instances in which defendant Doss's attorney interrupted the trial court and prevented it from ruling on objections. Shortly before the challenged comments were made, the court asked counsel not to talk over it when it was trying to rule on an objection. Counsel apologized and stated that he did not intend any disrespect. In earlier incidents, as well as in the cited example, defense counsel acknowledged that he was interrupting the court. Nevertheless, defense counsel continued to interrupt the court, which again explained that when the prosecutor made an objection, it needed time to rule on the objection. The problem recurred throughout the trial and at one point the court instructed defense counsel, outside of the jury's presence, that as a matter of procedure he should stop talking when the prosecutor objected so that the court could rule on the objection. Viewed in context, the record does not demonstrate that the trial court's conduct pierced the veil of judicial impartiality. The court was attempting to conduct an orderly trial and efficiently try the case. Defense counsel acknowledged that he was interrupting the court at times and not following the court's procedure for ruling on objections. In context, the court's comments were intended to limit the interruptions and did not hold defense counsel up to excessive contempt in the eyes of the jury or destroy the balance of impartiality necessary for a fair trial.

Defendant Doss additionally argues that the trial court improperly assumed the prosecutor's role by ruling on the admissibility of evidence when the prosecutor did not object or before the prosecutor could object. We disagree. The record reveals that the trial court made evidentiary rulings in favor of both sides. Defendant Doss's attorney objected at times during trial, but failed to state a basis for his objection or failed to give the proper ground for an objection. In those instances, the trial court sometimes supplied a ground for objection when agreeing with defense counsel that the evidence was inadmissible. The court's rulings do not reflect bias or partiality, but rather its desire to make sure that the case was tried properly on the basis of admissible evidence. On the record before us, we are not persuaded that the court's rulings limited defendant's right to cross-examination, unduly prejudiced him, or reflected any bias in the court's rulings.

Defendant Doss next argues that the trial court violated his Sixth Amendment right to counsel of his choice when it granted the prosecution's pretrial motion to disqualify his attorney, Henry Greenwood, from representing him. We disagree. We review for abuse of discretion a trial court's decision regarding a defendant's right to counsel of choice. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). The prosecution moved to disqualify Greenwood from representing defendant Doss, because Greenwood also represented James Klein, whom the prosecution intended to call as a witness at defendant Doss's trial. Klein was an inmate at the county jail and was housed with defendant Doss. Klein claimed that defendant Doss spoke to him about the charged offense and confessed that he shot the victim. Klein was awaiting trial on charges of unarmed robbery and assault with intent to do great bodily harm, but was permitted to plead guilty to a lesser offense pursuant to a plea and sentence agreement in exchange for his testimony against defendant Doss. There is no dispute that Greenwood represented both defendant Doss and Klein when Klein revealed his conversation with defendant Doss and attempted to negotiate a plea bargain in exchange for his testimony against Doss. The trial court granted the prosecution's motion to disqualify Greenwood from representing defendant Doss because the situation created a conflict of interest.

"A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *Akins, supra* at 557. One situation in which the right to counsel of choice is carefully circumscribed is when the same attorney represents multiple criminal defendants, creating circumstances rife with potential conflicts of interest. *Wheat v United States*, 486 US 153, 159-160; 108 S Ct 1692; 100 L Ed 2d 140 (1988). When a trial court is alerted to possible conflicts of interest because one attorney represents multiple defendants, the court must take steps to decide if the conflicts warrant separate counsel. *Id.* at 160. A court may prevent joint representation without an actual conflict of interest, and it has substantial latitude in refusing waivers of conflicts of interest when a potential conflict of interest may develop into an actual conflict as the trial progresses. *Id.* at 163. Although there is a presumption in favor of the defendant's choice of counsel, "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.* at 164; see also MCR 6.005(F). In this case, counsel's representation of both defendant Doss and Klein would have prevented him from ethically cross-examining Klein in defendant Doss's case without one of his two clients suffering prejudice. Defendant Doss faced the possibility of an ineffective cross-examination of Klein, and Klein faced a possible revelation of past confidences, perjury, or other personal information. See MRPC 1.7 and 1.9(a). As in *Wheat, supra*, a waiver of this conflict would not have cured the problem. Because the prosecution intended to call Klein as a witness, there was no other option but to disqualify Greenwood from representing defendant at trial. Therefore, the trial court's decision to discontinue counsel's representation was not an abuse of discretion.

II. Docket No. 266830

Defendant Goins's sole argument on appeal is that the evidence was insufficient to convict him of aiding and abetting a felony murder. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."

People v Wolfe, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). We are required “to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). “[I]f an aider and abettor participates in a crime with knowledge of the principal’s intent to kill or to cause great bodily harm, the aider and abettor is acting with ‘wanton and willful disregard’ sufficient to support a finding of malice.” *People v Riley (After Remand)*, 468 Mich 135, 141; 659 NW2d 611 (2003), quoting *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). Malice can be inferred from participation in a crime whose scope may include killing the victim, see *People v Carines*, 460 Mich 750, 759-60; 597 NW2d 130 (1999), or in participating with knowledge that the principal will use a deadly weapon to accomplish the crime. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

The evidence showed that defendant Doss was armed with a handgun and shot the victim. Defendant Goins admitted to taking the victim’s jacket after he was shot. Defendant Goins argues that even if the jury believed that he willingly took the victim’s coat, the evidence did not create a fair inference that he knew, before the larceny, that defendant Doss was armed and intended to commit a robbery, or that he participated in the offense with the requisite malice for felony murder. However, the evidence contradicts defendant’s argument. Defendants Doss and Goins were in a vehicle in a parking lot with Otis Clark and Darryl Brown before the shooting. According to Clark, when the victim drove his vehicle into the parking lot, defendant Doss told defendant Goins, “This is the one.” Afterward, defendants Doss and Goins both exited the vehicle and approached the victim. This evidence was sufficient to support an inference that defendant Goins was aware that defendant Doss had targeted the victim and knowingly assisted defendant Doss in a plan to rob him.

Furthermore, although defendant Goins indicated in his police statement that defendant Doss was wearing a coat, suggesting that any gun he had was hidden in the coat, Clark testified that defendant Doss was not wearing a jacket, and a videotape of the crime taken by a store security camera verified that defendant Doss was only wearing a t-shirt and no jacket. Viewed most favorably to the prosecution, this evidence allowed the jury to infer that defendant Doss did not conceal the handgun as defendant Goins implied, so defendant Goins assisted defendant Doss knowing he was armed.

Additionally, after the crime was committed, the group drove to a gas station and, according to Clark, defendant Goins asked defendant Doss what they had obtained from the victim. Defendant Goins wanted to keep the victim’s coat, but then agreed to give it to defendant Doss, but defendant Goins kept some money that was taken from the victim. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendants Doss and Goins were acting together and that defendant Goins was acting with wanton and willful disregard of the likelihood that their actions would cause death or great bodily harm to the victim. See *Carines*, *supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O’Connell
/s/ Christopher M. Murray